

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant :	Todor G. Georgiev	Art Unit :	2624
Patent No. :	7,558,433	Examiner :	Amir Alavi
Issue Date :	July 7, 2009	Conf. No. :	6459
Serial No. :	10/748,013		
Filed :	December 30, 2003		
Title :	HEALING BY TEXTURE SYNTHESIS IN DIFFERENTIAL SPACE		

Commissioner for Patents
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APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(d)

Patentee hereby requests reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent. Reconsideration of the final PTA calculation to increase total PTA from 942 to 980 days, is respectfully requested.

REMARKS

“A Delays” are defined as delays by the U.S. Patent and Trademark Office (PTO) under 35 U.S.C. § 154(b)(1)(A), which guarantees prompt PTO response. “B Delays” are defined as delays by the PTO under 35 U.S.C. § 154(b)(1)(B), which guarantees no more than three year application pendency. To the extent that the periods of delay overlap, the period of any term adjustment shall not exceed the actual number of days the issuance of the patent was delayed. 35 U.S.C. § 154(b)(2)(A). As outlined in Wyeth et al. v. Jon W. Dudas (580 F. Supp. 2d 138; 88 USPQ 2d 1538), the only way that these periods of time can “overlap” is if they occur on the same day. If an “A delay” occurs on one calendar day and a “B delay” occurs on another calendar day, they do not overlap and 35 U.S.C. § 154(b)(2)(A) does not limit the extension to one day. Id.

The PTA for the instant patent, as currently calculated and shown on the face of the patent, apparently relies on the premise that the application was delayed under 35 U.S.C. § 154(b)(1)(B) *before* the initial three-year period expired. The Wyeth v. Dudas court determined that this construction cannot be squared with the language of 35 U.S.C. § 154(b)(1)(B), which applies “if the issue of an original patent is delayed due to the

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I hereby certify that this paper was filed with the Patent and Trademark Office using the EFS-WEB system on this date: September 3, 2009.

failure of the United States Patent and Trademark Office to issue a patent within 3 years.”

“B delay” begins only after the PTO has failed to issue a patent within three years, not before.

Id.

REVIEW OF PATENT TERM ADJUSTMENT CALCULATION

“A Delay”

A first PTO action was due on or before February 28, 2005 (the date that is fourteen months after December 30, 2003, the date on which the application was filed). The PTO mailed the first non-final Office Action on September 28, 2007, thereby according a PTO Delay of 942 days. Patentee does not dispute the PTO's calculation for this “A Delay” from March 1, 2005 (the day after the date that is fourteen months after the date on which the application was filed), to September 28, 2007. See 37 C.F.R. §§ 1.702(a)(1) and 1.703(a)(1).

In view of the period of “A Delay” detailed above, the total “A Delay” for this patent should be calculated as 942 days.

“B Delay”

The period beginning on December 31, 2006 (the day after the date that is three years after December 30, 2003, the date on which the application was filed), and ending July 7, 2009 (the date the patent was issued), is 920 days in length.

“B Delay” may not include the number of days in the period beginning on the date on which a Request for Continued Examination was filed and ending on the date the patent was issued. In the present application, a Request for Continued Examination (RCE) was filed on November 5, 2007, and the patent issued on July 7, 2009, resulting in a period of 610 days that must be excluded from the three year delay calculation. Patentee respectfully submits that the date entered in the PAIR/PALM system for the filing of the RCE -- October 5, 2007 -- is incorrect and that the correct date associated with this response is November 5, 2007, as evidenced by the document in the image file wrapper. See 37 C.F.R. §§ 1.702(b)(1) and 1.703(b)(1).

In addition, "B Delay" may not include the number of days in the period beginning on the date on which a Notice of Appeal was filed and ending on the date of mailing of a Notice of Allowance. In the present application, no Notice of Appeal was filed.

See 37 C.F.R. §§ 1.702(b)(4) and 1.703(b)(4).

In view of the periods of "B Delay" detailed above, the total "B Delay" for this patent should be calculated as 310 days (i.e., 920 days minus 610 days). The PTO calculated 0 days of delay for issuance of a patent more than three years after filing. Patentee respectfully submits that the PTO's calculation of this "B Delay" is incorrect and that the correct PTO Delay for issuance beyond three years from filing is 310 days. See 37 C.F.R. §§ 1.702(b) and 1.703(b).

Overlap of "A Delay" and "B Delay"

As detailed above, "A Delay" accumulated during the following period:

March 1, 2005, to September 28, 2007.

As detailed above, "B Delay" accumulated during the following period:

December 31, 2006, to November 5, 2007.

As such, the periods of "A Delay" and "B Delay" overlap (i.e., occur on the same calendar day) for a total of 272 days, from December 31, 2006 to September 28, 2007.

Applicant Delay

Patentee respectfully submits that there were no circumstances constituting a failure to engage in reasonable efforts to conclude processing or examination of the application as set forth in 37 C.F.R. § 1.704.

Terminal Disclaimer

This patent is not subject to a terminal disclaimer.

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Page : 4 of 4

Attorney's Docket No.: 07844-0624001 / P577

Conclusion

In consideration of the events described above, Patentee believes the PTA calculation of 942 days is incorrect. As such, Patentee respectfully requests reconsideration of the PTA in the following manner:

- 1) Total PTO Delay should be calculated as 980 days (i.e., the sum of 942 days of "A Delay" and 310 days of "B Delay" minus 272 days of overlapping "A Delay" and "B Delay");
- 2) Total Applicant Delay should be calculated as 0 days); and
- 3) Total PTA should be calculated as 980 days.

The fee of \$200 required under 37 C.F.R. § 1.18(e) is being submitted herewith. Please apply any other required charges or credits to Deposit Account No. 06-1050, referencing attorney docket number 07844-0624001.

Respectfully submitted,

Date: September 3, 2009

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